

The enterprise zone building materials exemption allows retailers located in the municipality or unincorporated area of a county that established an enterprise zone to make tax-free sales of building materials that will be incorporated into real estate located in that enterprise zone. See 86 Ill. Adm. Code 130.1951. (This is a PLR).

October 26, 2001

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see <http://www.revenue.state.il.us/legalinformation/regs/part1200>), is in response to your letter of July 12, 2001 and additional information submitted October 19, 2001. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

On behalf of our client, COMPANY, we respectfully request the Illinois Department of Revenue issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code Section 1200.110 with respect to the following factual situation.

General Information

1. Enclosed please find an original Form IL-2848 Power of Attorney, authorizing FIRM to represent Company before the Illinois Department of Revenue (the 'Department').
2. This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. The PLR is requested to determine the Retailer's Occupation Tax and Use Tax consequences of the actual business practices of the Company.
3. The Company is not currently engaged in litigation with the Department in regard to this or any other tax matter.
4. The Company is not currently under audit by the Department in regard to any tax matter.

5. To the best knowledge of the Company's personnel, the Department has not previously ruled regarding this matter for the Company. In addition, the Company has not submitted the same or similar issue to the Department.
6. The Company requests that certain information be deleted from the PLR prior to dissemination to others. The Company requests that its name, address, location of its facility and the name of its representative and contractor be deleted.
7. The Company knows of no authority contrary to the authorities referred to and cited below.

Statement of Material Fact

1. The Company is engaged in owning and operating an electricity generating facility.
2. The Company is constructing an 1,100 megawatt natural gas fired combined-cycle electricity generating facility (hereafter referred to as the 'facility') in COUNTY, Illinois.
3. The facility is located within the COUNTY Enterprise Zone.
4. The Company has entered into an engineering, procurement and construction agreement with AAA to have the facility constructed.
5. The Company and AAA have established procedures in order to satisfy the requirements as provided in 86 Illinois Administrative Code Section 130.1951 to qualify for the 'Enterprise Zone building materials exemption.' Please refer to Attachment A for the specific procedures that AAA has implemented to procure the building materials.
6. The following items represent the significant materials that will be purchased from a retailer within the Enterprise Zone for incorporation into the facility. Please refer to Attachment B that describes these items and the manners in which they are affixed to the realty. These materials will be referred to herein after as 'the materials:'
 - a. Concrete foundations for building and equipment support.
 - b. Four (4) combustion turbine generators.
 - c. Four (4) steam turbine generators.
 - d. Four (4) heat recovery steam generators.
 - e. Cooling tower.
 - f. Electrical equipment including above-ground and below-ground conduit and cabling.
 - g. Piping for water and natural gas supply.

Ruling Requested

- 1) The procedures established by the Company and AAA that are identified in Attachment A meet the Department's requirements as provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Sec. 130.1951 in order to qualify for the sales tax exemption for the sale of building materials to be incorporated into realty within an Enterprise Zone.
- 2) The major materials identified and described in Attachment B qualify as 'building materials' for the purpose of the Retailer's Occupation Tax deduction provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Sec. 130.1951(a)(7).

Relevant Authorities

The Illinois Retailers' Occupation Tax Act [35 ILCS 120/2] imposes a tax on persons engaged in the business of making retail sales of tangible personal property. In accordance with Section 2-10 of the Act, this tax is measured by a seller's gross receipts [35 ILCS 120/2-10]. Pursuant to Section 5k of the Act [35 ILCS 120/5k], a retailer whose place of business is located within a county or municipality which has established an Enterprise Zone and makes sales of 'building materials' to be incorporated into real estate within the Enterprise Zone by remodeling, rehabilitation or new construction, may deduct receipts from such sales in the calculation of taxable gross receipts.

In order to qualify for the exemption provided in 35 ILCS 120/5k, certain procedural and documentation requirements must be satisfied. The retailer must be located in the municipality or unincorporated area of the county that established the Enterprise Zone into which the building materials will be incorporated. 86 Ill. Admin. Code Section 130.1951(a)(2) provides that this requirement will be satisfied if, at the time of the sale, the retailer:

- 1) has an identifiable presence in the municipality or county that has established the Enterprise Zone.
- 2) is registered as a retailer at a location in the municipality of unincorporated area of the county that has established the Enterprise Zone.
- 3) is able to document the acceptance of purchase orders at the registered location in the municipality or the unincorporated area of the county that established the Enterprise Zone.

86 Ill. Admin. Code Sec. 1951 further provides that two separate transactions must exist independent of each other and must properly documented. The transactions are:

- 1) a sale from the supplier to the retailer who is located in the jurisdiction that created the Enterprise Zone; and
- 2) a sale from the retailer who is located in the jurisdiction that created the Enterprise Zone to the purchaser.

The following documentation establishes a sale from a supplier to a retailer who is located in the jurisdiction that created the Enterprise Zone:

- 1) a purchase order issued by the retailer to the supplier;
- 2) a Certificate of Resale issued by the retailer to the supplier;
- 3) an invoice from the supplier to the retailer; and
- 4) evidence of payment to the supplier from the retailer.

The following documentation establishes a sale from the retailer who is located in the jurisdiction that created the Enterprise Zone to a purchaser:

- 1) a purchase order issued by the purchaser to the retailer;
- 2) an exemption certificate issued by the purchaser to the retailer certifying that the materials will be incorporated into realty within the Enterprise Zone;

- 3) an invoice from the retailer to the purchaser; and
- 4) evidence of payment to the retailer from the purchaser.

To meet the above requirements, AAA has established a retailer that will be located in COUNTY within the boundary of the COUNTY Enterprise Zone. As provided in Attachment A, the retailer has established a physical presence within COUNTY and will receive, accept and approve purchase orders at this location. The retailer will purchase the materials that will be physically incorporated into realty within the Enterprise Zone. The retailer will resell the building materials to AAA who will provide for or contract for the installation and erection of the building materials into the realty.

The facts indicate that the procedures established by AAA, and provided in Attachment A, satisfy the requirements set forth in 86 Ill. Admin. Code Section 130.1951. Therefore, the retailer may make tax-free sales of qualifying building materials that will be incorporated into realty within the COUNTY Enterprise Zone.

In order to qualify for the deduction as provided in 35 ILCS 120/5k, the materials must constitute 'building materials' as provided in 86 Ill. Adm. Code Sec. 130.1951(a)(7).

86 Ill. Admin. Code Sec. 130.1951(a)(7) provides:

In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for *physical incorporation* into real estate. (Emphasis added)

Therefore, the question is whether the materials described in Attachment B will qualify as 'building materials,' that is, whether the materials are purchased for 'physical incorporation into real estate.'

The Department in Private Letter Ruling 99-0009 (March 9, 1999) ruled that pipe racks, pipe, supports, and piping tie-ins installed at a natural gas fired power plant would constitute 'building materials' under the Department's regulations because they were permanently affixed to real estate. Further, since the real estate was located within an Enterprise Zone such items incorporated into real estate could be purchased tax-free from qualified retailers.

In a more recent decision, the Department in Private Letter Ruling ST 00-0013 (July 7, 2000) found that certain materials incorporated into realty within an electricity generating facility qualified as a building material pursuant to the Department's regulations. The Department found that turbine generators, electrical transformers, electrical cabling, piping and other materials that are permanently affixed to real estate qualify as a 'building material' for purposes of the deduction provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Sec. 1951(a)(1).

The facts and issues stated in ST 00-0013 are virtually identical to the issues at hand in this letter ruling request. The materials at issue here will be permanently and physically attached to the realty. Please refer to Attachment B for details on the method of affixation. Removal of the materials after affixation, including the combustion turbine generators and steam turbine, would result in substantial damage to the materials and realty. The anchor bolts, which are embedded in the concrete foundation, would have to be removed. Removing the anchor bolts would cause damage to the anchor bolts, the

foundation, the underground electrical cable and piping, and possibly cause damage to the building material itself. Therefore, this demonstrates that the equipment, after being attached, is permanently affixed.

Conclusions

35 ILCS 120/k provides that a retailer whose place of business is located within a county or municipality which has established an Enterprise Zone, and who makes sales of 'building materials' to be incorporated into real estate in that Enterprise Zone by remodeling, rehabilitation or new construction, may deduct receipts from such sales in the calculation of taxable gross receipts.

The deduction provided in 35 ILCS 120/5k is applicable to receipts from retail sales of 'building materials.' In order to qualify as 'building materials,' the items must be physically incorporated into real estate.

The materials in question qualify as 'building materials' for purposes of the deduction provided in 35 ILCS 120/5k. The materials are physically and permanently incorporated into realty as described in Attachment B. Therefore, since the materials qualify as building material and are incorporated into realty within an Enterprise Zone, the materials may be purchased from a qualifying retailer free from Retailer's Occupation Tax and Use Tax.

We respectfully request that the Department issue a ruling stating that the procedures outlined in the Attachments A satisfy the Department's regulations found at 86 Ill. Admin. Code Sec. 130.1951 to satisfy Enterprise Zone deduction and that the materials described in Attachment B qualify as 'building materials' for the purposes of the deduction provided in 35 ILCS 120/5k.

If the Department can not conclude that the procedures outlined above conform to the Department's regulations or that the materials do not qualify as 'building materials,' I request the Department contact me to determine what additional information is required or allow the taxpayer to rescind this ruling request.

Enclosed is a copy of 86 Ill. Adm. Code 130.1951 concerning Enterprise Zones. The enterprise zone building materials exemption allows retailers located in the municipality or unincorporated area of a county that established an enterprise zone to make tax-free sales of building materials that will be incorporated into real estate located in the enterprise zone. In order for businesses to qualify for the exemption as retailers, they must comply with the following requirements:

1. Retailers must have an identifiable physical presence in the municipality or the county that has established the enterprise zone;
2. Retailers must register with the Department as a retailer at a location in the municipality or in the unincorporated area of the county that has established the enterprise zone;
3. Retailers must be able to document the acceptance of purchase orders at a location in the municipality or the county that has established the enterprise zone.

In order for the enterprise zone building materials exemption to be claimed, it must be shown that qualifying building materials were purchased from a retailer located in the jurisdiction that created the enterprise zone into which the building materials will be incorporated. It is critical that a clear paperwork trail exists showing that buyers purchased the materials from qualified retailers. In general, the following two transactions must exist:

1. Sales from suppliers to retailers who are located in the jurisdiction that created the enterprise zone (exempt as sales for resale); and
2. Sales from retailers who are located in the jurisdiction that created the enterprise zone to buyers (exempt by reason of the enterprise zone building materials exemption).

Each of these transactions must exist independent of the other and the exemption applicable to each transaction must be documented. We urge taxpayers not to be cavalier in structuring these transactions. Generally, the following documentation establishes the two transactions and the available exemptions:

1. Sales from suppliers to retailers:
 - a. Purchase orders from retailers to the suppliers;
 - b. Certificates of Resale from retailers to suppliers (see the enclosed copy of 86 Ill. Adm. Code 130.1405, which describes the requirements for Certificates of Resale);
 - c. Invoices from suppliers to retailers; and
 - d. Payments to suppliers from retailers.
2. Sales from retailers to purchasers:
 - a. Purchase orders from purchasers to the retailers;
 - b. Enterprise zone building materials certifications from purchasers to retailers containing all of the information set forth at 86 Ill. Adm. Code 130.1951(a)(6);
 - c. Invoices from retailers to purchasers; and
 - d. Payments to retailers from purchasers.

There is no requirement that the materials be physically received at the retailer's location.

Under the scenario you set forth, you have indicated that the retailer will have an identifiable physical presence in the municipality or the county that has established the enterprise zone. You have also indicated that the retailer is registered with the Department as a retailer at a location in the municipality or in the unincorporated area of the county that has established the enterprise zone. Further, you have indicated that the retailer will be able to document the acceptance of purchase orders at a location in the municipality or the county that has established the enterprise zone.

Your letter indicated that a clear paperwork trail would exist showing that suppliers sold the materials to qualified retailers who then resold them to the contractor. Your letter also stated that the

retailer will issue a Certificate of Resale to the material supplier and that the material supplier will invoice the retailer who would make payment to the material supplier. The retailer will, in turn, resell the building materials to a procurement company who will issue properly executed exemption certificates certifying that qualifying materials will be incorporated in to realty within the enterprise zone. An agency agreement exists between the procurement company and the retailer allowing the procurement company to perform certain functions of the retailer. Sales of the building materials made in compliance with the scenario set forth in your letter will qualify for the enterprise zone exemption.

In the next part of the analysis we must determine whether the items being incorporated are building materials as defined in the regulations. Section 130.1951(a) states, in part, as follows:

- 7) In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for physical incorporation into real estate.

The building and equipment foundations consisting of concrete and rebar qualify as building materials. Further, anchor bolts, electrical conduit and piping and other fixtures embedded in the foundations qualify as building materials.

The Gas Combustion Turbines that are permanently affixed to the foundation qualify as building materials. It is the Department's understanding that such turbines are physically attached to a steel reinforced concrete foundation with anchor bolts. The Generator that is permanently affixed to the foundation with anchor bolts qualifies as a building material. The Stack, which is constructed of stainless steel plates that are welded together and permanently attached to the base which in turn is attached to the foundation with anchor bolts, qualifies as a building material. The Air Inlet System, which is attached to a foundation construction on top of the Gas Combustion Turbine foundation with anchor bolts and is hardwired into underground and aboveground cabling and piping, qualifies as a building material.

The Heat Recovery Steam Generators, which are constructed on site and permanently affixed to the foundation with anchor bolts, qualify as building materials.

The Steam Turbine Generator that is affixed via anchor bolts to a foundation and that is hardwired to underground and above ground electrical cabling, qualifies as a building material.

The Cooling Tower, which consists of a concrete foundation basin to which the tower is anchored with anchor bolts and which is further connected by piping and electrical cabling to other facility equipment, qualifies as a building material.

In regards to the electrical equipment, the Generator Step-up Transformers that are attached welded to the main tank qualify as building materials. The power circuit breakers that are attached to a steel structure that is anchored to a building foundation by anchor bolts qualify as building materials.

The piping that is installed 4 to 10 feet underground qualifies as a building material. The aboveground piping that is supported by "T" supports that are physically attached to the foundation by anchor bolts, qualifies as a building material. In addition, the piping that is physically welded to equipment supports that are attached to the foundation qualifies as a building material.

The materials used to build the Power Distribution Building that has a structural steel frame with 24-gauge corrugated steel siding and roofing qualify as building materials.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.